public funds entrusted to him. *Fairchild* v. *Hedges,* 14 Wash. 117; *County of Mecklenburg* v. *Beales,* 111 Va. 691, 36 L. R. A. (N. S.) 285; *Northern Pacific Ry. Co.* v. *Owens,* 86 Minn. 188; *State* v. *Bobleter,* 83 Minn. 479; *Estate of Ramsay* v. *People,* 197 Ill. 572, 90 Am. St. Rep. 177. To this rule of liability exceptions have generally been made of cases where the funds have been lost without the officer's fault, solely by act of God or the public enemy, *United States* v. *Thomas,* 15 Wall. 337 (act of public enemy); *Thompson* v. *Board of Trustees,* 30 Ill. 99 (dicta); *State* v. *Lee,* 72 Miss. 281 (dicta); *Maloy* v. *Board of County Commissioners,* 10 N. Mex. 638. A few cases refuse to make even these exceptions. *Havens* v. *Lathene,* 75 N. Car. 505; *State* v. *Walsen,* 17 Colo. 170. In some states, however, the rule is established that the officer having custody of public moneys is relieved from responsibility for the loss of funds which he has exercised due care and diligence to preserve. *Livingston* v. *Woods,* 20 Mont. 91; *State* v. *Copeland,* 96 Tenn. 296; *State* v. *Gramm,* 7 Wyo. 329. This is clearly the minority rule.

The case noted is of especial interest because the funds in question were private, not public, funds. Some few courts have drawn a distinction in cases of this sort between public and private funds, and hold the officer liable as a bailee for hire in event of the loss of funds of the latter class. *Gartley* v. *People,* 28 Colo. 227; *People* v. *Faulkner,* 107 N. Y. 477. The reason sometimes offered for such distinction is that as the public corporation is not liable for the loss of funds where there is no negligence, so the officer, the agent of the public corporation, ought not to be. It is frequently unsafe to apply the analogy of agency in cases involving officers. Officers are frequently liable for injury or loss when the public corporation which he serves is not liable. So the reason offered is not convincing. In *People* v. *Faulkner, supra,* the reason suggested for the distinction between public and private funds is the greater degree of watchfulness and scrutiny which the owner of private funds gives to the acts of an officer who has custody of his funds. This reason is not very convincing, and it seems that the attempted distinction might well be disregarded and the officer held to the same liability for loss of private funds and for the loss of those of the public. In the great mass of cases involving liability of the officer for loss of funds without his fault the distinction has not been raised. *Shaw* v. *Bauman,* 34 Ohio St. 25; *Smith* v. *Patton,* 131 N. Car. 396; *Phillips* v. *Lamar,* 27 Ga. 228.

G. S.

EXECUTION SALES AS PREFERENTIAL TRANSFERS IN BANKRUPTCY.—In the recent case of *Golden Hill Distilling Co.* v. *Logue,* 243 Fed. 342, the Circuit Court of Appeals for the Sixth Circuit holds that a "creditor who recovers a judgment, by consent or *in invitum,* and by execution sale collects his money within four months preceding bankruptcy, and with reasonable cause to believe [that a preference would thereby be effected] receives a voidable preference, which he must repay to the trustee."

This question is one that has vexed the bankruptcy courts ever since the Supreme Court of the United States in *Clarke* v. *Larremore,* 188 U. S. 486,

declined to answer it. It usually arises under circumstances as follows: C sues his insolvent debtor, B, obtains a judgment against him, issues and levies an execution, and sells under the levy. If the bankruptcy of B intervenes at this point, before the sheriff has turned over to C the proceeds of the execution sale, it is clear under the decision in *Clarke* v. *Larremore* that if the judgment is less than four months old it is avoided and the property affected by its lien is discharged and released from the same by the provisions of § 67f of the BANKRUPTCY ACT of 1898 which reads in part as follows: "* * * all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same * * *." And it is equally clear that under these circumstances it is immaterial whether the creditor has, or has not, any information or notice as to his debtor's insolvency or intent to prefer.

But what if the sheriff has already turned over to C the proceeds of the execution sale before B becomes bankrupt? It will make the problem simpler to assume, as before, that B's bankruptcy ensues within four months of the entry of the judgment, though, as will be pointed out later, it may be that this requirement is not absolutely necessary. Although there was some early difference of opinion on the point, it seems to be now settled that the effect of § 67f is to strike down, not the judgment itself, but only the lien of the judgment. REMINGTON, BANKRUPTCY, §§ 777, 1448; *Doyle* v. *Heath,* 22 R. I. 213; *Pope* v. *Title Guaranty & Surety Co.,* 152 Wis. 611; *Rodolf* v. *First Nat. Bank,* 30 Okla. 631, 640. It has accordingly been held in numerous cases that under the circumstances shown above—where the lien of the judgment is no longer in question, having disappeared at the time of the execution sale—§ 67f does not have the effect of completely avoiding the judgment and all the proceedings under it; and a proceeding brought under § 67f against the creditor who has received the proceeds of the execution sale must therefore fail. *Botts* v. *Hammond,* 99 Fed. 916, 40 C. C. A. 179; *In re Blair,* 102 Fed. 987; *In re Knickerbocker,* 121 Fed. 1004; *Levor* v. *Seiter,* 74 N. Y. Supp. 499, 69 App. Div. 33; *Johnson* v. *Anderson,* 70 Neb. 233; *Greene* v. *Montana Brewing Co.,* 28 Mont. 380; *Starbuck* v. *Gebo,* 96 N. Y. Supp. 781, 48 Misc. 333; *Farrell* v. *Lockett,* 115 Tenn. 494; *In re Bailey,* 144 Fed. 214; *Nelson* v. *Svea Pub. Co.,* 178 Fed. 136; *In re Weitzel,* 191 Fed. 463. Two cases (*In re Breslauer,* 121 Fed. 910, and *Staunton* v. *Wooden,* 179 Fed. 61, 102 C. C. A. 355) are sometimes cited as holding that § 67f avoids the judgment *in toto,* but in both of these cases the execution sale took place after bankruptcy, and they are therefore not in point upon the particular question now under examination. However, in *Dreyer* v. *Kicklighter,* 228 Fed. 744, the District Court for the Southern District of Georgia set aside a sale under circumstances like those outlined above and held that the trustee in bankruptcy was entitled to recover the property from the purchaser at the execution sale, who had been a participant in the creditor's fraudulent intent to secure a preference. In this case the court intimated that the purchaser would nevertheless be allowed

credit for the amount he had paid for the property at the execution sale, and that the trustee in bankruptcy could then under § 60b recover the same amount from the execution creditor to whom it had been paid by the sheriff who made the sale; this on the ground that the execution creditor had been preferred by the transaction, and had had reasonable ground to believe that a preference was to be effected.

This brings us to the question as to whether or not, under the circumstances outlined above, the trustee in bankruptcy, failing to recover under § 67f, is entitled to recover under § 60b, which reads in part as follows: "If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, * * * and being within four months before the filing of the petition in bankruptcy * * * the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby * * * shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person." It has been held in *Galbraith* v. *Whitaker*, 119 Minn. 447; *Moore* v. *John H. Smith & Sons*, 205 Fed. 431; *Anderson* v. *Stayton State Bank*, 82 Ore. 357; and *Grant* v. *Nat. Bank of Auburn*, 232 Fed. 201, under facts similar to those under consideration, that when the creditor has reasonable cause to believe that a preference is being effected the trustee in bankruptcy may recover from him the value of the property thus sold on execution. The same conclusion is reached in the principal case.

The cases which come to this conclusion, however, do not agree as to the grounds for their decisions. In *Moore* v. *John H. Smith & Sons*, and in *Anderson* v. *Stayton State Bank* it seems to have been the view of the court that it was the *judgment* that was made voidable by § 60b and that was avoided by the suit of the trustee. The Minnesota court in *Galbraith* v. *Whitaker*, and the Circuit Court of Appeals in the principal case seem to take the view that either the execution sale or else the payment of the proceeds to the creditor amounted to a *transfer* under § 60b and that it was this transfer that was voidable and that was set aside by the trustee's suit. And in *Grant* v. *Nat. Bank of Auburn*, (which, by the way, is the only one of these four cases to be cited in the principal case), Judge Ray intimates that it is the *preference* that is voidable by the trustee. This diversity of opinion is natural, for, as stated in the principal case, "it must be conceded that there are, in sections 60a and 60b, no provisions which in terms, reach the proceeds of a satisfied judgment."

What is it, then, that can be set aside by the trustee under the power given him under § 60b? It may be: (1) the judgment; (2) the transfer arising from the execution sale or the payment of its proceeds, or (3) the preference, which would probably include both (1) and (2).

There are obvious objections to the view that it is the judgment that is to be avoided. In the first place, under the circumstances we are considering, the judgment has been satisfied and is no longer in existence, as is pointed

our clearly in the cases cited above as holding that § 67f does not apply to this situation. Moreover, the "entry of judgment" itself does not always "operate as a preference," though that is the language of the statute. Frequently something in addition to the entry of the judgment, as docketing, recording, or levy, is required to make the judgment operate as a preference by enabling the judgment creditor "to obtain a greater percentage of his debt than any other" creditor of the same class. It is difficult, therefore, to see how, under the circumstances before us, the courts are justified by § 60b in allowing the trustee to recover from the creditor on the ground that the judgment is voidable.

Is the execution sale—as suggested by the Minnesota court—or the payment of its proceeds—as held in the principal case—such a "transfer" as is contemplated by § 60b? This construction is of course based on the broad definition of "transfer" in § 1(25). Though, as the court admits in the principal case, the applicability of § 60b is not clear or certain, at least this construction has some advantages of expediency over the view that it is the *judgment* that is avoided by § 60b. If we have a transfer, it undoubtedly operates as a preference, as required by the section, while, as has been seen, the judgment alone does not necessarily have this effect. Moreover, it gives less opportunity for the creditor to defeat the trustee's suit on the ground that he did not have reasonable ground to believe that a preference was to be effected. A creditor might obtain a judgment without having such reasonable ground, and yet have it at the time of the execution sale or of the turning over of the proceeds. If the "judgment" view of § 60b is taken, of course, it is his knowledge at the time of the entry of the judgment that is material; if the "transfer" view is taken it is his knowledge at the later date of the execution sale or of the turning over of the proceeds. In this aspect of the case, it is clear that the holding in the principal case—that the turning over of the proceeds makes the "transfer"—is preferable to the Minnesota court's holding that it is the execution sale that makes the "transfer," simply because it refers the test of "reasonable ground to believe" to a later time.

Judge Ray's suggestion that it is the "preference" that is voidable is perhaps open to the objection that it makes less certain the exact time that is to be taken for applying the test of "reasonable cause to believe." Otherwise it possesses many of the advantages of the view taken in the principal case, and is free from one objection that may be urged against the latter view.

In the principal case the date of the entry of the judgment is not given. It is likely that it was within four months before the debtor's bankruptcy, but that fact does not clearly appear; and if we are to accept the court's statement that the turning over of the proceeds is a "transfer," of course the preference consists in the transfer, not in the judgment, and the date of the judgment becomes immaterial, the critical date being that on which the proceeds of the execution sale were turned over to the creditor. But it has repeatedly been held that after four months from the date of the filing of a judgment (perhaps more accurately the date on which it becomes a lien) the judgment is immune from attack on the ground of preference, and the judgment creditor's preference then becomes a non-voidable preference. This

was distinctly held in *Colston* v. *Austin Run Mining Co.,* 194 Fed. 929, 114 C. C. A. 565, and in *In re Deer Creek etc. Co.,* 205 Fed. 205 where the preferences were being considered as acts of bankruptcy; and it seems to have been the view of the Supreme Court in *Citizens Banking Co.* v. *Ravenna Nat. Bank,* 234 U. S., 360, 367-8, where the same result is admitted and approved. The cases are collected in REMINGTON, BANKRUPTCY, §§ 143, 1451. If the principal case is to be followed out logically it must be held that a transfer takes place when the proceeds of the execution are paid over to the creditor. If the debtor is then insolvent and the transaction results in a preference, an act of bankruptcy has been committed; if the creditor then has reasonable cause to believe that a preference will result, the trustee can recover the preference from him. This construction of § 60b practically nullifies the requirement of the section as to judgments, and upsets the generally accepted view as to the impregnability of a judgment more than four months old. To be sure, such a judgment might be impregnable as long as the judgment creditor did nothing to make it fruitful by sale; as soon as he did this, however, he would run the risk of having a bankruptcy proceeding begun, and of having to pay back to the trustee any proceeds received from the sale.

If, however, the judgment in the principal case was obtained within four months of the bankruptcy the decision of course applies only to cases where such was the fact. And as thus restricted in effect the decision certainly reaches a desirable result in perhaps the most desirable way. Inasmuch as the court admits that the words of the statute are "far from apt" and do not "in terms, reach the proceeds of a satisfied judgment" and as the court calls to its support §§ 3a (3), 60a, 60b, 67c and 67f, as well as the 1910 amendment to § 60b, in concluding that the general purpose of the act can only be effectuated by the decision arrived at, it seems pretty clear that the suggested restriction on the rule can be supported about as well as the rule itself. It is to be hoped that the Supreme Court will uphold the desirable result reached in the principal case.

E. H.